MICHIGAN SUPREME COURT

PUBLIC HEARING
SEPTEMBER 29, 2005

JUSTICE TAYLOR: Good morning. Today, of course, is the day established for the public administrative hearing. For some of you who may have never commented to the Court before, our rules are 3 minutes which will become known to you when your 3 minutes have expired by a red light that goes on on the podium and we're going to be rather ruthlessly enforcing that today because we have a great number of people who have signed up. By no means do you need to take your 3 minutes, you could even take a lot less, and if something has been said before, assume we've heard it. So let's get started. Elan Stavros.

ITEM 1: 2002-29 STANDARDS FOR LAWYER SANCTIONS
2003-62 RULES OF PROFESSIONAL CONDUCT

MS. STAVROS: Good morning Chief Justice Taylor and Justices. It's good to see you. My name is Elan Stavros and my firm, McClellen & Anderson represents the Michigan Association of Realtors. We run a legal hotline for the Association members. Our concern today is regarding the comment to proposed Rule of Michigan Professional Conduct 6.5 titled "Non-Profit and Court-Annexed Limited Legal Services Programs". Section 1 of the comments in the second sentence to 6.5 states "In these programs such as legal advice hotlines, a client-lawyer relationship is established." This statement establishes the first element of a legal malpractice lawsuit--an attorney-client relationship. There are at least 3 reasons why this rule is inadvisable. First, establishing the first element of a legal malpractice lawsuit imposes legal liability on all legal hotlines without regard to their individual factual circumstances. We do not consider our hotline to create an attorney-client relationship under substantive law, however this rule decides this issue for us unequivocally. This increased liability would quite simply put our hotline out of business as it might do with the other hotlines in Michigan and as this rule has threatened to do in other states. Second, an ethical rule simply cannot change the precedential common law that already establishes that an attorney-client relationship is established as a factual inquiry in a case by case basis. This is acknowledged even by the current and proposed MRPC in the Scope, §17. Third, this issue does not simply affect our legal hotline. At least one other legal hotline that we've spoken to in Michigan, the State Bar Law Day Legal Hotline, would like to maintain that there is no attorney-client relationship formed on this hotline. However, the comment to this rule unequivocally says it is so. Other examples may include local radio call-in programs such as the one in Lansing in which an attorney staffs a phone and answers questions of a legal nature. This rule is actually meant to encourage hotlines to operate but unfortunately this element of the rule would actually discourage them. Further, realtor associations in other states have had their hotlines threatened when this rule,

which is based on the ABA model rule, of course, was proposed in their states. For example, in Montana the comment to this rule was not adopted, allowing the Montana realtors' hotline to continue operation.

JUSTICE TAYLOR: Ms. Stavros, have you folks submitted what you would consider satisfactory alternative?

MS. STAVROS: Yes, Your Honor. What I would say, in conclusion, is this rule could actually be rewritten as follows, or the comment rather, the sentence. It could say "In these programs such as legal advice hotlines, a client-lawyer relationship may or may not be established under common law." This way the purpose of the rule, which is to encourage hotlines to operate, would actually come to be. Thank you very much for your time, Your Honors.

JUSTICE TAYLOR: Thank you. Barry Gates.

MR. GATES: Good morning, Chief Justice Taylor and other members. My name is Barry Gates. I am a solo practitioner in Ann Arbor. I'm here today to speak in support of §20 of the proposed new Michigan Rules of Professional Conduct. §20 addresses the situations when the rules can appropriately be used in non-disciplinary cases such as legal malpractice cases. By way of disclosure, first I have a pending interlocutory appeal in the Court of Appeals where one of the issues is a similar issue. Second, about 15% of my practice is legal malpractice cases. Most of those are on behalf of plaintiffs, but I also represent a fair number of attorneys who, either because of the lack of malpractice insurance or high retention limits or for other reasons have selected me to represent them. §20 of the proposed rules strikes a fair balance for the use of the rules in the non-disciplinary litigation context. As with the current rules, a violation of the proposed rules would not create a cause of action and it would not create a presumption that a legal duty has been breached. In §20 of the proposed rules, the proposal has added that a violation of a rule may be evidence of breach of the applicable standard of conduct. That same balance that I think I see in your proposed §20 is struck in the jury instructions that we have, particularly Civil Jury Instruction 12.01 and 12.05 where a statute perhaps leads to an inference of negligence, whereas a rule or regulation violation is simply evidence of malpractice or may be evidence of negligence. And the proposed §20 patterns that exactly. Trial in legal malpractice cases often comes down to a battle of experts with largely divergent opinions as to what the standard of conduct or standard of care is. Proposed §20 acknowledges that the rules do establish standards of conduct by lawyers. As such, that information should be available to assist a jury in resolving what the standard of care is and whether it was breached. I would also ask the Court to consider adding the first and last sentence of §20 to the body of Rule 1.0.2. The current rule 1.0(b) does state that the admissibility of the rules is governed by the rules of evidence and other provisions of the law. However, proposed §21 indicates the

statements in the Scope section are not to be interpreted as rules. The addition of proposed--

JUSTICE TAYLOR: Mr. Gates, I'm sorry, your time is up.

JUSTICE YOUNG: Have you submitted written comments?

MR. GATES: I have not, Your Honor.

JUSTICE TAYLOR: You may want to do that, as it makes it easier for us to consider this rather encyclopedic work to know what your concerns are.

MR. GATES: I will do that.

JUSTICE TAYLOR: John Allen.

MR. ALLEN: Good morning, Mr. Chief Justice, Justices. It's another great day to be a lawyer. We're fortunate to have your time and your consideration to these very important proposals. A short disclaimer--I have burdened you with two different letters at various times, one about a year ago, one in May, that are on your website. It has been my honor to serve as the chair of the State Bar Ethics Committee in the past. Currently, I chair the special committee on grievance. I was also on the advisory committee for the ABA Ethics 2000 project which eventually became Ethics 2003, I guess, and eventually became a web to these proposals. I am not here in any of those capacities today. I speak only for my law firm and for myself. I have to take a moment of my time to thank the many people who have worked in this effort for you. They include the State Bar Ethics Committee which came up with the original proposal, largely a conformity with the ABA Ethics 2000 proposal; the State Bar Grievance Committee, who worked also hard in critiquing some of those proposals; the Representative Assembly; the State Bar--Nancy Deal, John Berry, who produced a redline copy for study by everybody that helps us get through what we're looking at today. The Attorney Grievance Commission, Bob Agisinski, the Attorney Discipline Board, John Van Bolt, and his colleague, Mark Armitage. If you haven't looked at their comparison proposal in tri-color on the internet you really ought to. It's visually beautiful if nothing else, but it is also a very good vehicle for understanding the alternatives that are available relative to lawyer sanctions. My partner, Terry Bacon, who you'll hear from later on. He has a 96-page section by section analysis of your proposal that deserves reading by everyone. It is not a rant--it is a very detailed and technical analysis demonstrating that Terry has probably forgotten more about this stuff than most of us will ever learn and it is a real educational experience going through that. All the commenters and the 1,000-plus lawyers that attended the sessions around the state organized by the representative assembly and my partner, Elizabeth Jamieson, in her capacity as heading that effort. It has been a monumental effort on the part of the Bar and one in which probably a good deal of work

remains to be done. It is appropriate because we're looking at a strict liability, quasi-criminal disciplinary code. That, as the last speaker notes, has morphed itself over time into a platform and ramp to a variety of civil liability challenges to fee reasonableness and also an instrument of disqualification of clients chosen lawyers in the courts that all of you supervise. Lawyers in the 21st century are much more likely to encounter this code in that civil context than in the disciplinary context. For that reason a couple of procedural matters that are not covered in your proposal. One is that there should be a deferred effective date that provides us adequate time to teach lawyers about these massively new provisions that they will have to deal with. There are 150 or more--

JUSTICE CORRIGAN: Question. How long do you need to teach it. A year?

MR. ALLEN: I would think, Your Honor, something on the order of 6 months to a year as a minimum, and I've already spoken with Lynn Chard, Shel Start, the people at ICLE, they're fully prepared to do that and mount an effort equivalent to when we changed the court rules back in the mid-80s. I think virtually every Michigan lawyer will need to spend a better part of a full day just becoming acquainted with what your final proposals are.

JUSTICE TAYLOR: Mr. Allen, I'm sorry, but your time is up.

MR. ALLEN: Thank you, Your Honor.

JUSTICE TAYLOR: Donald Campbell.

MR. CAMPBELL: Mr. Chief Justice, Justices, may it please the Court, I am Donald Campbell. You have received two writings from me relative to the standards and that's the point of which I wish to speak today to you. I want to confess, as I think I did in my original memorandum, that the submissions I made to this Court were flawed concerning the proposals I had with regard to standards to be imposed for lawyer sanctions in the state of Michigan. I still believe, after reviewing all the writings on the website, especially those from the Attorney Discipline Board, which are substantial, that their proposal is more seriously flawed when it comes to certain critical aspects of the standards including standards, for example, that under the ABA's version define conduct that in Michigan does not violate the rules, in fact does not even violate the ABA rules. But that aside, my real purpose in coming here is again to amplify something in my original memorandum that I made back in September of 2002 and that is to say that the standards as a whole are a bad way to impose lawyer sanctions in Michigan. I ask this Court to consider drafting and bringing together a commission on the issue of guidelines more akin to the sentencing guidelines of criminal cases where we can really look at offender variables and offense variables so that we can make a standard application of discipline. You're going to end up with a range--nothing is going to tell you like a

computer whether it's a 30 day, 60 day, 180 day suspension. Nobody expects, and nobody would want that kind of exactitude and that's certainly not what I'm recommending and I don't believe that's what the criminal sentencing guidelines do, but we need to have a range of what type of suspension is appropriate, whether or not it is one that requires reinstatement, whether or not it is one that requires retaking the bar exam or other activities, and I think that's a better form of approaching the question of lawyer sanctions. I think it's a tried and true method in the criminal area. I appreciate your time and I thank you very much for reading and considering my prior proposals. Thank you.

JUSTICE TAYLOR: Thank you, Mr. Campbell. George Kemsley.

MR. KEMSLEY: May it please the Court, George Kemsley of the Bogman firm. I appear here today to speak on two points. I've submitted a written comment on both previously. First, I oppose the effort to reduce the relevancy of the rules in civil actions by creating a new proposed Rule 1.0.2 modeled on the current Rule 1.0(b). I think the ABA proposal which contains no such rule strikes a better balance between lawyer concerns and client interests by cautioning against the misapplication of the rules but expressly recognizing that a lawyer's violation of a rule may be evidence of breach of the applicable standard of conduct. In Michigan, under the current MRPC, some circuit courts have misapplied Rule 1.0(b) to decline subject matter jurisdiction over clients' well-pleaded breach of fiduciary duty or contract claims against their lawyers. Somewhat of disclosure, I have a case in the Court of Appeals on that point now. A grievance is simply not an adequate substitute for a civil action. A client should be able to sue a disloyal lawyer to prevent harm or to seek damages. A client's injury is not remedied by simply preventing the scoundrel lawyer from harming the next lawyer, which is the purpose of the grievance rules. I believe that where the model rules help define the scope of a lawyer's duties, they should be admissible in civil action. The duty of loyalty, the duty to avoid conflicts, existed long before the ethics rules or the code or the model rules were implemented. In this complex world the rules help define and shape what a lawyer has to do, what his relationship is. That shouldn't be decided on a case by case basis. So where MRPC or the new rules are relevant to what the lawyer has done, I believe they should be admissible in the case. Secondly, I oppose the inclusion of a confirmed in writing requirement in the conflict rules. Specifically 1.7, 1.9, 1.12 and 1.18. That's a best practices standard and shouldn't be part of the rule. It's unworkable, it will create traps for lawyers. Conflicts often crop up at the last moment. They're resolved normally by a quick communication with in-house counsel who either decides that it is a not a conflict after all, or that it's waived. To then say that the failure to confirm that in writing vitiates the knowledge of both consent from the client I think creates a trap for lawyers while serving no purpose, so I oppose the confirmed in writing requirement, which by the way, the general assembly by a super majority recommended against including in the rules. So please do not deprive clients of the ability to sue their disloyal lawyers in appropriate cases and please eliminate the confirmed in writing requirement from the (inaudible). Thank you.

JUSTICE TAYLOR: Terrance Bacon.

MR. BACON: Good morning. I won't repeat my 90-plus page comments for you. They do cover a number of the topics that were raised here earlier. It took a long time going through that. The reason I did it in the long run is we have many brilliant people looking at these rules but I was afraid that people were looking at particular rules and not looking at the overall scope. This is an opportunity when you re-examine the rules for you to be paying attention to all the rules including those that are current and for which there has been no change. Remembering what you are doing in this role is legislating and this Court has in recent years followed a doctrine of applying the plain meaning of statutes and court rules, and it is therefore important that when you look at these rules you think about what the plain meaning is of those rules and how they apply to a variety of circumstances. Many of the rules as written by the ABA have compromises located in the comments. Or in the long run nobody thinks this rule can be enforced. And I tried to illustrate some of those problems in my comments, some of which we rely on now, the good graces of the Attorney Grievance Commission that they would never seek to enforce the rule in that fashion. But in a doctrine of applying the plain meaning of rules, you have an obligation to look at those plain meanings and if there is something in the comment that really is the explanation of the rule, it ought to be in the rule itself. There is a second principle at times that I think it is important to look for, and it is hidden sometimes in a definitional section. The rules should not impose on lawyers obligations to advise non-clients, the clients that they are not representing in that matter, other than to tell them you should consider getting your own lawyer. The definition of informed consent, when it is used in a variety of these rules, actually imposes the obligation on a lawyer to give advice and explanations to people who are not that lawyer's client with respect to that matter. It exacerbates conflicts rather than solves them. A topic that I addressed that wasn't generally addressed by other comments is the opportunity that what you ought to be doing is contracting these rules to the areas that are of the most significant concern. One of the areas that you can have a great deal of contraction is in the advertising/solicitation/referral section of the rules, many of which grew out of mid-20th century concepts which really don't apply anymore. Focus those rules on what you're trying to protect, which I would say you're trying to protect against misrepresentations to the public, an over-reaching in that regard, and focus. Thank you.

JUSTICE TAYLOR: Thank you, sir. Daniel Dziedzic.

MR. DZIEDZIC: Good morning. My name is Daniel Dziedzic and I'm here today as a private citizen to comment on the revisions to the Rules of Professional Conduct. I appreciate the opportunity to participate in this process. I have become very interested in the Rules of Professional Conduct over the last 2 years and learned a great deal about the legal profession during that time. The rules set the tone and the standards for the quality of legal services provided to the citizens of our state. There are a number

of improvements in the new iteration of the rules compared to the initial rules of 1988, however I believe there are 3 areas that are not adequately addressed including interaction with vulnerable groups, especially the elderly; interactions with families during estate planning, and indemnification of attorneys by individuals. To the first point, elderly citizens require special consideration when dealing with attorneys, especially in the context of estate planning. Sadly, it is my experience that the elderly are not well-served in this process. The average person has difficulty dealing with legal terminology and concepts and understanding the implications of actions proposed by attorneys. If the average person has difficulty, how much more challenging is this for the elderly. I request that the court establish a separate section of the rules dealing with the protection of our most vulnerable citizens including the elderly. The second point relates to the rule of the family in the estate planning process. In this process families who are unfamiliar with legal matters receive unsolicited letters written in complex legal language from attorneys that can contain complex business agreements and plans. It is unrealistic to think that family members will retain separate attorneys to interpret these documents for each of their particular situations, especially if they believe that the attorney is acting in the interest of the entire family. Therefore families require special attention in the rules because they are especially vulnerable to disadvantageous, complex schemes and financial arrangements put forth by probate attorneys and their business partners. My third point relates to indemnification. Indemnification of attorneys by ordinary individuals is a very dubious practice, especially when indemnification is limited in time and amount. Indemnification of attorneys is not only common, but apparently is often a requirement of malpractice insurance companies. Individuals, as opposed to businesses who are protected by corporate attorneys in the principle of limited liability have no concept of what they're getting involved with when they enter into an agreement of this sort. And lawyers do not explain the real implications of this obligation. The reality today is that ordinary individuals and families are indemnifying the business interests of attorneys, attorney business partners and malpractice firms with their personal savings and assets. In short, their life's work and their financial future. I strongly believe that this practice should be explicitly addressed and banned by the rules. In conclusion, I request that the Court review the Rules of Professional Conduct with a fresh, constructive critical eye, taking into account the issues I've raised today. Thank you very much for your time and attention.

JUSTICE TAYLOR: Thank you. Elizabeth Jamieson.

MS. JAMIESON: Good morning, Justices. I'm speaking today, not individually, but on behalf of the State Bar of Michigan representative assembly, a body of 150 individuals elected to represent over 37,000 lawyers within this state. As you know, the assembly provided this Court with two lengthy reports on the proposed rules and standards, one in December 2003, and another in May 2005. A supplemental report has also been provided to clarify the assembly's positions on Rule 1.15, safekeeping property, and the use of injury within the standards. I am not here today to repeat the

more than 40 recommendations made to this Court regarding the rules and standards. The reports speak for themselves and I am not in a position to provide substantive clarification regarding each recommendation. The assembly is not a drafting consortium. It is a policy-making body. It is comprised of practitioners from around the state and from a variety of practices who listened to numerous ethics and discipline experts before making the recommendations outlined in the reports. Instead, I would like to focus on the assembly's request for the Court to consider all the comments submitted thus far and then republish updated proposals for further comment. The proposed rules and standards are encyclopedic and complex and enormously significant to the life of practitioners. As chairperson of the assembly, I moderated 7 expert panel discussions around the state addressing the proposed rules and standards published by this Court. With relatively little advance notice, the discussions turned out to be standing room only events. Powerful evidence that lawyers across the state recognize the importance of this undertaking. There is also no question that the magnitude of the rules presents a major challenge. Time and time again lawyers expressed their fear that the rules might be changed and take effect before they could fully understand all the practical nuances of the proposed changes. Much work has already been done by the ABA, the State Bar Ethics Committee, the Representative Assembly and the Court on studying and analyzing the rules. But given their magnitude I believe more remains to be done and communicated to the profession and to the Court. There is no urgency for our state to adopt new rules and standards immediately. Our system, like others across the nation, may be ripe for improvement but it is not broken. Indeed Michigan has a well-earned representation for leadership and excellence in attorney ethics and thus bears an exceptional burden as we contemplate amending our rules. Like life, the improvement of our rules and standards should be a journey. This Court will no doubt reach its destination and enact improved rules and standards for Michigan. My simple message is that you do not call an end to this journey without additional substantive analysis and comment to support new rules and standards that protect both lawyers and the public.

JUSTICE TAYLOR: Ms. Jamieson, thank you very much. Your time has expired. Carlo Martina.

MR. MARTINA: Good morning, Your Honors, my name is Carlo Martina. I come to you today as the immediately past president of the Wayne County family law bar association. I'm here to speak about proposed change to Michigan Rule of Professional Conduct 1.5(f). A particular proposal that was unanimously rejected by the Representative Assembly, based upon the things that I've read in this Court's record, unanimously rejected by the State Bar of Michigan Family Law Council and by the Wayne County Family Law Bar Association. For one, it is an unreasonable rule. There should be the right for an attorney to have a minimum fee for certain services that they render, and they should be permitted to retain that fee. And if as a result of their maturity and their skills and their abilities and the various factors that we see under (A) 1 through 8, then they have earned that fee. There are also some serious procedural problems with

it. One, with regard to the first factor, complexity, likelihood of preempting other work. For one, 1.5(A)1 and 2 already deal with this. They talk about if a fee is being questioned, looking at the novelty of difficulty, the skill required, the exclusion of other cases among other factors. Additionally--this whole bench has been practicing lawyers--how many times have clients come into you and said you know, I've got an easy case. I just need for you to tie up the loose ends. It's rare that you can determine the complexity of the case at the outset. The second point actually with regards to being in writing, we agree. Frankly I think every retainer agreement should be in writing but I think with non-refundable retainers it definitely should be and if you look at our proposal that is one of the *sin quo nons* of this. It must be in writing. It clearly, explicitly states that the fee is non-refundable. So we kind of cover that in the proposal that we give. With regards to (3)--sufficiency of intelligence, maturity and sophistication. How are we to judge intelligence. I know that contract law talks in terms of competence to contract. I know also that MRCP 1.14 talks about as a lawyer if we believe a client before us needs representation, is incompetent of being able to communicate with us or contract with us, we have the right to ask that a guardian ad litem be placed in their position. But if I have to judge their intelligence to keep a non-refundable fee, I'll be honest with you, even with 27 years of experience, I don't think I could do it. With regards to maturity, I know some 18-year-olds who are more mature than 40 year olds, but I don't think that's a litmus test that can be used here. And in terms of sophistication to understand, if the contract is clear and unambiguous that should be sufficient. Then this Court has a very, very explicit rule with regards to determining whether or not a fee is unreasonable. And lastly (4), sets aside a block of time--well 1.7 already says we can't take cases if our responsibilities already preclude us from handling those cases diligently. So that's covered. With regards to turning down other cases, this is like the straw that breaks the camel's back kind of rule. In other words, until we get to the point where we can't take one more case--

JUSTICE TAYLOR: Mr. Martina, your time is expired. Thank you very much. Robert Gillett.

MR. GILLETT: Good morning Mr. Chief Justice and Justices. My name is Robert Gillett. I'm the director of Legal Services of South Central Michigan, a non-profit organization providing free legal services to low income people in 13 Michigan counties. I'm here today representing the State Bar of Michigan's Justice Initiative Committee. I'm a member of that committee and a chair of the pro bono initiative of the State Bar. Generally, I want to make a brief comment on the process. I'm a member of the National Legal Aid and Defender Association Board of Directors and through that board have seen this process develop from the initial ABA ethics 2000 process and I just want to express appreciation to the ABA, the State Bar and to the Court for your efforts to inform lawyers of these changes and to offer us the opportunity to participate in the process. I think we should all feel proud of that process to date. But I'm here to talk about one small and specific part of that process, Rule 6.1. Rule 6.1 provides guidance to lawyers regarding our responsibilities to provide legal services to those unable to pay. It's

the pro bono rule. I'm here to support the proposed rule as published by the Court but to ask for a small but significant change to that draft rule. That change is described in detail that the Honorable Cynthia Stevens and Richard McClellan and myself submitted to the Court. Cynthia and Richard are co-chairs to the justice initiative committee. The rule as published by the Court is a significant change from the current rule. The old rule is one paragraph long. It basically says a lawyer should render public interest service and all the detail regarding pro bono was not in the rule but was in a policy statement adopted by the representative assembly in 1990 called the voluntary standard. The proposed rule as published by the Court and recommended by the representative assembly more closely resembles the ABA rule which is longer, more inclusive, more detailed and more flexible than the current Michigan rule. The committee presented this rule to the representative assembly. We wanted to track the ABA rule but to add Michigan specific detail to that rule. However, in transmitting the rules to the Court, the representative assembly caught our changes in the text to the rule but missed those edits in the comment to the ABA rule. So we're asking for two Michigan specific additions to paragraph 10 of the comments: one, to recognize the State Bar's Access to Justice campaign as a vehicle for donations in lieu of service, and second, to recognize the Bar's role in certifying programs supported by the profession to provide free legal services to people unable to afford it. As chair of the pro bono initiative for the last 4 years, I have had the opportunity to speak to hundreds of lawyers about pro bono.

JUSTICE TAYLOR: Thank you very much. Your time has expired. Jack Cote.

MR. COTE: Good morning, Your Honors. Chief Justice, members of the Court, I speak from two different perspectives. One from the perspective of having been the first chair of the Attorney Discipline Board when our system was bifurcated back in October of '78. I had the distinction of serving for seven years, which will never be duplicated because of the change in the rules, and as chair for the first 5 years. Second perspective I speak is as a practitioner in having represented (inaudible) not more than 150 other attorneys and many judges. My comments will be brief. First, with regard to consent discipline. You have a letter from Robert Agisinski, the Grievance Administrator, dated October 30, 2003 to Corbin Davis. I endorse those comments. With regard to imposing standards, I think there has to be some leeway with regard to consent disciplines. Secondly, I think we have to be careful not to adhere too strictly to hard and fast standards for attorney discipline. There are many, many unique factors that enter into the determination of whether or not there has been misconduct and if there has been misconduct, what the appropriate discipline is. And so I would urge that, with regard to any consideration with regard to standards, that there be room for consideration of unique factors that may be present and I think this Court has recognized that. Third and lastly for the moment, because I know my time is limited, from my perspective the system works, and it has worked exceedingly well. I see no need to rush to judgment and if a further

publication of proposed changes is necessary I think the Court ought to carefully consider doing that. I thank the Court for its time.

JUSTICE TAYLOR: Thank you, sir. Jonathan Tukel.

MR. TUKEL: May it please the Court, Chief Justice Taylor. My name is Jonathan Tukel. I'm an assistant U.S. Attorney for the Eastern District of Michigan. I'm here in support of proposal Alternative B to Rule 4.2 of the Rules of Professional Conduct, which governs communications with represented parties. The proposed Alternative B has been endorsed both by the U.S. Attorney for the Eastern District of Michigan, Attorney General Cox, the Prosecuting Attorneys Association of Michigan and the FBI director for the entire state of Michigan. The proposed alternative would change the rule which is currently more restrictive than the constitutional rule and it would return it to the 6th Amendment test. Under the current rule there are several harmful effects to law enforcement in terms of criminal investigations. First of all, because the rule is more restrictive than the constitutional rule, it creates a disincentive for law enforcement agents to consult with prosecuting attorneys--

JUSTICE CORRIGAN: When you say current rule, do you mean the current rule in force right now or the proposal?

MR. TUKEL: The current Rule 4.2. It creates a disincentive for law enforcement agents to consult with prosecuting attorneys because any advice would be governed by the rule, which is more restrictive than the constitutional rule. We cited in our letter to the Court some of the harms that can result from that, in addition to the fact that the rule discourages consultation by law enforcement, the rule also has the ironic effect of sometimes causing a more intrusive search. We gave an example in our letter of a search where law enforcement agents after having consulted with the U.S. Attorney's office were told not to ask parties who were subject to a search warrant where certain records were and what they were, which resulted in a more extensive and more intrusive search. The second harmful effect of the current rule is that it chills prosecutors from giving advice from counseling on how to fully conform with the law. It consumes resources and it consumes a lot of time because we take the obligation seriously. Example No. 12 in the FBI Special Agent's letter gives an example of a case where consultation was sought and before a determination could be made whether or not the proposed search would conform with law, the opportunity to conduct the investigation was lost. The opponents of the rule--the State Appellate Defenders' Office has suggested that this is a special rule. I would simply submit to the Court it is a special rule because it recognizes the unique role of prosecutors in criminal investigations, a role which has already been recognized by this Court in Rule 3.8 which provides special obligations of prosecutors. This rule would provide reciprocal recognition of the special rule and would exempt prosecutors. Thank you.

JUSTICE TAYLOR: Thank you. Lori Buitweg.

MS. BUITWEG: Good morning Chief Justice Taylor and Justices. May it please the Court, my name is Lori Buitweg and I'm a family law attorney from Ann Arbor, Michigan. I requested a place on the agenda this morning to address the Court regarding the proposed requirement that a lawyer obtain or transmit in writing a person's agreement to a proposed course of conduct after the lawyer has communicated information and explanation reasonably adequate under the circumstances about the material risks of and reasonably available alternatives to the proposed course of conduct. This is 1.0(B). The in writing and informed consent requirement will have an unexpectedly negative effect on not only the practice of law, but more importantly, the public for whom the very requirements are intended to protect. The most important courses of conduct undertaken in cases are best discussed one-on-one, in person, between a client and a lawyer. It is only in person that we can observe one another's facial expressions, demeanor and body language. Discussions by telephone are probably second best but the most stilted and least effective methods of discussing and deciding upon a course of conduct with a client is in writing, because it does not allow for spontaneous questions or observations of the client as options and risks are described to them. This makes it difficult to help our clients decide what is best for them, because we cannot identify how they are feeling or reacting to their options as they are being explained. Of course, we could have the one-on-one conversations and then follow that up with written communication or vice versa but there are two major drawbacks to this cumulative approach. Number one is the cost to the client. Number two is the drain on the lawyer's time to perform other necessary tasks pertaining to the case. The proposed rule also makes it difficult to predict whether a particular type of writing such as email, letters by regular versus registered mail, or a simple note to the file will be adequate. I am also concerned about the degree of explanation that will be deemed to be reasonably adequate under the circumstances to explain material risks of and reasonably available alternatives to the proposed course of conduct, and also whether any and all courses of conduct versus material courses of conduct require informed consent. There is a vast spectrum of possible degrees of explanation, doctoral dissertations using statistical analyses, mathematical formulas and diagrams could be written in just about every one of our cases regarding what should go into the decision making process, but we are not doctoral students, we are lawyers who use our education and experience to cull an intuition that sometimes cannot be explained. In conclusion, the writing and informed consent requirements will not achieve the intended effect of protecting the public, but rather will cause cases to be resolved more slowly and more expensively.

JUSTICE TAYLOR: Thank you. Theodore St. Antoine.

MR. ST. ANTOINE: Good morning Chief Justice Taylor, Justices. I'm Ted St. Antoine and I happen to be the lamest of lame ducks. Tomorrow I conclude my service both as chair and as member of the Attorney Discipline Board. I like to think that

that status gives me a special advantage in making just two general observations about the standards for sanctions. My six years of service encompass the entire period in which the Board and our hearing panels have been enforcing the LaPatent points with regard to the application of ABA standards and the adaptation of them to the state of Michigan. I think that I can report on behalf of the Board and the hearing panels that on the whole they have operated well and I therefore cite the ancient adage that if it ain't broke don't fix it, or at the very least approach it in terms of refinements and not in terms of some massive overhaul. The second point I'd like to make, and I make this one with a little more diffidence. You have entrusted to the Board a special responsibility in providing you with our recommendations with regard to legal sanctions. If I may say so, I have been most impressed with the quality of my colleagues on this board. It is one of the most impressive groups, both in terms of lawyers and non-lawyers, that I have ever been associated with and we have made a very hard effort, strenuous effort with the help of our extraordinarily well-qualified lawyers, our staff, to provide you with the best possible set of recommendations. I do hope that you will take into account that when you ask people of this quality to devote time an effort to a task like this, that you will give a special sense of credence to the results they put before you. Thank you very much.

JUSTICE TAYLOR: Thank you, sir. William Hampton.

MR. HAMPTON: Good morning, Chief Justice Taylor, Justices. Initially I would like to thank the Court for the confidence that you have expressed in me by your appointment for me to become chairman of the Attorney Discipline Board for the upcoming year effective on Saturday of this week. I greatly appreciate your support and confidence and of course I will endeavor to the best of my ability to lead the Attorney Discipline Board in the upcoming year. On or about January 26 of this year the Attorney Discipline Board submitted its comments to the Court in response to the Court's publication of their proposed Michigan standards for imposing lawyer sanctions for comment. We have submitted to you in this document our comments on the specific standards which compares the published standards published by the Court, some revisions to those standards that are recommended by the Attorney Discipline Board, together with an alternative proposal that was submitted. Obviously, time does not permit me to discuss in detail all of our comments but I am hopeful that the Court has copies of our report and will take the time to look at the comparisons and hopefully give some deference to our experience in dealing with these standards since the Court decided the Lopaten case back in the year 2000. In general, as Dean St. Antoine has indicated, these standards have worked very well. I've been on the Attorney Discipline Board now since 2001 and I am very pleased with the way the standards have operated. We now have our decisions on a website for practitioners to look at. There is a history of decisions, there is precedence that people can look at in terms of how these standards are applied. Because of the limited time I only wish to focus on one issue and that is the issue of consideration of injury or harm in imposing discipline. The Attorney Discipline Board strongly recommends that in accordance with the framework of the ABA standards, that injury

and potential injury should be one of the initial factors distinguishing among the generally appropriate levels of discipline to be considered before the aggravation/mitigation phase of the sanctions analysis, and therefore we would like you to take a hard look at 3.0 of the standards and the fact that the board is recommending the injury or harm factor be put into the matrix for initial consideration. We are opposed to the published version of 3.0. We are concerned about the fact that in the published version of 3.0 you have deleted the language "potential or actual injury caused by the lawyer's misconduct" and we believe very strongly that the degree of injury or potential--

JUSTICE TAYLOR: Excuse me, I think your time is up. Thank you. John Van Bolt.

MR. VAN BOLT: If it please the Court, I'm going to yield my time. I don't think I can improve upon my...

JUSTICE YOUNG: I just wanted to ask--were the points that Mr. Hampton was making, have the post-publication concerns that the ADB has, have those been--

MR. VAN BOLT: Oh, yes, yes. In the document that Mr. Hampton referred to which are our further comments to the proposed standards, that is in fact the centerpiece and the highlight of the cover letter which is the taking that injury factor out of the initial sorting process radically changes the way the standards were written and have been used in 30 other jurisdictions for 20 years. And taking that out would really put us, Michigan, out into another area altogether, an area which the Board does not feel would be in the best interests of the system.

JUSTICE TAYLOR: Thank you very much. Mark Armitage.

MR. ARMITAGE: Good morning Chief Justice Taylor and Justices of the Supreme Court. I'm pleased to briefly present remarks on behalf of the ADB regarding the proper handling of retainers and fees paid in advance generally, and the proposals to amend MRPC 1.5 and 1.15 in particular. The proposals before you are evidence of the desire among practitioners for clarification in this area, and indeed we've already heard one speaker address that. Unfortunately, while the Board shares this desire for clarification, it cannot agree that either proposal is an improvement over the present state of affairs and therefore urges the Court not to adopt either of them that uses the term "non-refundable" in connection with retainer or fee. The Board will be submitting a memorandum today or shortly thereafter discussing its position and summarizing some approaches of other states to this problem of regulating fees paid at the outset of representation. It will not be in tricolor, however it will be rather drab compared to the document referenced by Mr. Allen. Presently Michigan lawyers may wonder what can I do with this money I received at the outset of the case, when can I treat it as mine. When,

if ever, must I return some of it. Can I call it a non-refundable retainer or is that misleading. The short answer to that question is probably resoundingly yes. The Michigan Rules as interpreted by the Board and the State Bar and its ethics committee offer some guidance but it's fair to say the definitive answers to some of these questions are lacking, and as the speaker noted, he takes issue with 1.5(F) as published for comment and that it's problematic and that's shared by other practitioners who have commented as well. The goal is that an attorneys should have the right to set and retain a minimum fee as articulated by Mr. Martina and that may be a worthwhile goal. However, we just submit that these two proposals will not achieve that goal and will in fact create more confusion. So again a written memorandum has been prepared and will be submitted. Since no fee is truly non-refundable until it's earned and been determined to be reasonable under the rules, prospectively labeling it will only cause confusion. We would ask that the Court not adopt either of those proposals and try alternative language. We would be happy to continue researching and providing assistance to the Court in this matter and helping to achieve the legitimate objectives of protecting the public as well as reasonable practices among the bar of collecting fees in an appropriate manner. So thank you for your attention.

JUSTICE TAYLOR: Thank you sir. I have a name Jan Eathorne. I'm not sure this lady wishes to address us or not.

MS. EATHORNE: Thank you, Michigan Supreme Court, for hearing me today. I'm here as a member of the public. I am asking you very seriously to protect the rights of the public in evaluating these over 150 amendments that the Michigan Bar is recommending. The state Constitution guarantees all citizens fair and just treatment and this, I'm not sure we've had very much input. The Michigan lawyers oath, which is just eight professed values, was the things that the Michigan legal profession pledges to adhere to during the course of their career. To a citizen reading it, it seems rather clear and unambiguous, but yet the Michigan Rules of Professional Conduct is over 128 pages of very, very fine print. And it is very, very difficult for us to be sure that what the Michigan lawyers' oath is saying when lawyers become professionals is what the 128 pages ends up being. I'm here to affirm my concerns that too many residents in Michigan just by reading the media, have been grievously harmed by professionals and I think too many professionals have fallen short of their professional oath on too many occasions and before you adopt these rules I ask that each one of you Justices randomly picks some cases of complaints that citizens have sent to the Attorney Discipline Board and the Attorney Grievance Commission and see how those cases were decided. I know that in my own case on at least 3 occasions I say down with administrators of these two offices and asked them to explain their decisions and they told me outright they can't do it. And if a citizen cannot understand how these decisions are being made it just seems fundamentally unfair that these decisions are being made without any public input. I've sat here and listened for about 30 minutes, and I don't see where the public had a chance to review these. I don't think the average citizen does realize they can review individual

attorney's complaints that have been filed, that have been made public record, and so I'm asking you as judges to step in on our behalf to protect our public rights and what the state Constitution guarantees us.

JUSTICE TAYLOR: Thank you. Carl Wilson

ITEM 2: 2003-04 MCR 6.412, 7.205 JURY SELECTION

MR. WILSON: Good morning. I'm here to talk about proposed rule MCR 6.412. I've given the bailiff copies of handouts for the Court to consider as they propose to change the ability of judges to remedy illegal jury polls. (inaudible Scott v Stanford, 60 U.S. 393, 404-405 reads: "On the contrary, they, African slaves were at that time considered as a subordinate and inferior race of beings who had been subjugated by the dominant race, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the government might choose to grant them." The proposal to change the right of judges to remedy illegal jury polls is wrong and should be refused completely. Under compelling government interests it is illegal and improper to discriminate based upon race, especially if the government seeks a remedy past and current discrimination against women, people of color and other protected classes of politically disenfranchised people. The proposal to eliminate the ability of a judge to remedy a jury that doesn't reflect a jury of one's peers will have a disparate impact on people of color. In Kent County, Michigan, the jury selection system had a hidden computer glitch that eliminated from jury service the neighborhoods where people of color lived. Mr. Wayne Bentley of Walker, Michigan complained and proved that Kent County's jury selection system was racist. Yet the Kent County prosecutor's office will not retry those cases. The Court of Appeals does not find those convictions under a racially discriminatory jury system to violate a defendant's rights. The new rule would force defendants and judges to face and hold illegal jury trials under a similar computer glitch in Wayne County, when an African-American Wayne County circuit judge found that the Wayne County system sent Detroit jurors to 36th District Court to try misdemeanor cases instead of felony cases. That judge was disciplined and threatened with her position to take family practice cases. This rule to deny judges to remedy illegal jury problems violates equal protection of the law and due process of law. The primary consideration when we try defendants is whether the jury reflects the community, not whether jurors have an easier ability to serve. The Michigan court system has a disparate impact and negative impact on people of color. This racist rule should not be adopted. Thank you.

JUSTICE TAYLOR: Erika Butler-Akinyemi.

MS. BUTLER-AKINYEMI: Chief Justice Taylor and Justices, good morning. I am attorney Erika Akinyemi and I'm here today to respectfully articulate the State Bar of Michigan's equal access initiatives' position regarding this Court's proposed

amendment of 6.412 of the Michigan Court Rules. It is an extraordinary honor and privilege to stand before you and I think you for the opportunity to speak. While we believe that this Court's effort to eliminate bias in our jury selection is laudable, we also believe that the proposed rule is redundant to controlling case law regarding the parties' use of preemptory strikes. Furthermore, the proposed rule is not only inconsistent with principles of access and fairness that underscore our justice system, but it is also at odds with principles assuring inclusion of all qualified jurors as required by our state Constitution and the laws enacted under it. Finally, we believe that jury selection is an area that is better suited to a judge's application of existing case law on a case by case basis. If the judge's interpretation of the law is erroneous or the judge's application of the law to the facts is an abuse of discretion, then litigants have recourse to appellate remedies which are capable of providing the necessary oversight. Existing law provides a strong rationale for the proposition that challenges to jury composition should be addressed on a case by case basis rather than by application of a flexible rule.

JUSTICE MARKMAN: Ma'am, I'm just a little bit confused. In one sentence you said it was redundant and the next sentence you said it was inconsistent. Which is it?

MS. BUTLER-AKINYEMI: Well actually, the proposed amendment has two parts. The first part states that there is to be no discrimination on the basis of race, color and sex. That part is redundant. Our Constitution, as well as the United States Constitution makes clear that there is not to be discrimination in jury selection. The second part of the rule which speaks to attempts to achieve a balanced representation is inconsistent with our Constitution and jurisprudence relative to having balanced representation on juries.

JUSTICE YOUNG: What case are you relying on for that proposition that there is an obligation to get a racially or any particular characteristic balance on the jury.

MS. BUTLER-AKINYEMI: I'm not relying on any particular case other than the example I would give that comes to mind immediately relates to the Grutter and Bolinger cases and by analogy, the Supreme Court in that case found that important interests are served by having diverse representation of lawyers within the legal profession and it is inconsistent to have diversity amongst our lawyers but to not have diversity or seek to have a balanced representation in the administration of justice. I see that my time is up. Thank you.

JUSTICE TAYLOR: Thank you ma'am. Valerie Newman.

MS. NEWMAN: Good morning, Your Honors. Valerie Newman. I'm pleased to be here today on behalf of the State Bar of Michigan on Justice Initiatives Committee as well as State Appellate Defender Office. Both the State Appellate

Defender Office and the Justice Initiatives Committee have submitted written reports here. I'm here on the proposed amendments to 7.205 to shorten the filing time deadlines for applications in the Court of Appeals from 12 months to 6 months. I realize the Court recently adopted other rules and this appears to be a change that you're making to make it consistent with the rule you just adopted for the 6-month time deadlines in the trial court in plea cases. However, I'm here today to urge the court not to adopt this today. First of all, we've got a lot going on in the system with the recent United States Supreme Court case in Halbert in dealing with how all of those cases are going to be dealt with. As the Court is probably much more well aware than I am, there is a lot going on around that case and how those cases are going to be handled and what the timing requirements are going to be. Additionally, there is nothing to indicate that there's a problem. While there's a minor inconsistency now with the rules that this Court just enacted which are soon going to go into effect, this incongruity is not substantial and it doesn't need to be cured right now. And what this will do, if you keep it at 12 months, we've already gone from 18 months to 12 months. Now we're going from 12 months to 6 months. It makes it almost impossible for practitioners to comply, it really does.

JUSTICE YOUNG: Can I ask a question? How many jurisdictions allow a delayed appeal and of those, what is the average time allowed.

MS. NEWMAN: I don't know the answer to that, Justice Young, but I'd be happy to look into it for you and do some research.

JUSTICE YOUNG: It would be nice to know whether 6 months is outside the standard deviation or within it.

MS. NEWMAN: I would be happy to research that for you and get back with you on it but the point in our state though is if we're going to allow it, we've got to allow enough time to be able to get it done. And from a practitioner's point of view as well as from the State Bar's point of view which takes into account, of course, a lot of practitioners from different areas, and you're going to hear from Mr. Flanagan who is going to talk a little bit as well about the civil end, it's just very difficult. I see my time is up and I thank the Court for its consideration. Thank you.

JUSTICE TAYLOR: Thank you. Terry Flanagan.

MR. FLANAGAN: Good morning Chief Justice, good morning, Justices. I'm Terry Flanagan and I'm here as a representative of the Appellate Practice Section of the State Bar. Our appellate practice section, as you know, is made up of civil and criminal attorneys. Plaintiffs' attorneys, defense attorneys, prosecutors, criminal defense attorneys. Our section has voted unanimously and overwhelmingly to oppose the reduction in time from 12 months to 6 months on MCR 7.205. First of all there is no

JUSTICE CORRIGAN: Does this mean there was a vote taken of the entire section on this, Mr. Flanagan? How many lawyers was that?

MR. FLANAGAN: 23 have voting rights. 14 responded to oppose, no one responded to support; 9 didn't vote. So perhaps I used unanimously--

JUSTICE CORRIGAN: Okay, so 14 lawyers support this and they were unanimous.

MR. FLANAGAN: Yes. In the civil context the change will not have as big an impact. Most applications are filed within six months. However, to have that safety valve for that necessary time for the unusual case, the 12 month rule that currently exists is working fine. In a criminal context this will create havoc--

JUSTICE YOUNG: Can I understand what you just said? You said normatively six months is when people are filing.

MR. FLANAGAN: Actually, from my understanding, more practitioners than not are filing within 21 days, are filing timely applications. But every civil practitioner has that unusual case and the case load--

JUSTICE YOUNG: So you're suggesting that the rule should be geared toward the exception?

MR. FLANAGAN: I'm saying that perhaps we should have a different rule for criminal and civil and--

JUSTICE CORRIGAN: I think we already do, Mr. Flanagan. Didn't we eliminate the late applications in civil cases? I thought the Court had done that.

MR. FLANAGAN: In the Supreme Court.

JUSTICE CORRIGAN: Period. We have one--

MR. FLANAGAN: You have a 42-day Supreme Court application but in the Court of Appeals we still have a 21 day timely and anything beyond 21 days and short of 365 is still delayed. Anyway, it creates havoc because the routine case takes up that much time. By definition, most cases are going to be delayed anyway because you have 42 days to request counsel. Then the judge has 14 days to appoint counsel. Then the court reporter has 91 days to prepare the transcript. You're already close to 6 months right there. If you change the trigger date from the time counsel is appointed then this rule will make sense. But most of those rules are honored in the breach. There is no court rule out there to enforce preparation of the transcript like there is in MCR 7.210(B) in the Court

of Appeals, there is no such comparable court rule for trial court enforcement of the transcripts. There just no time left, and thank you very much.

JUSTICE TAYLOR: Thank you. Paul Fischer is here to questions. Does anyone on the Court have questions for Mr. Fischer on Items 3 and 8 and 12, I guess, also. I think not, sir. Magistrate Krause.

ITEM 9: 2005-16 MCR 4.101 CIVIL INFRACTIONS HEARINGS

MAGISTRATE KRAUSE: Good morning, Chief Justice Taylor, Justices of the Supreme Court. I'm here today representing the Michigan Association of District Court Magistrates. Having a past president and board member for over 20 years and the Association's current secretary. Our president, Tim Blow, on behalf of the Board of Directors, has previously submitted a thorough, reasoned written request for rejection of proposed Rule 4.101. In addition, at the annual conference of our association held last week in Traverse City, the 55 members in attendance unanimously concurred with the position of the Board and respectfully ask that this proposed rule be rejected. Aside from inefficiency this would create in scheduling and tracking the types of civil infraction proceedings, the ultimate concern expressed by the association was the perception of fairness of court proceedings where a police officer would not be required to attend. The fact that a defendant driver must reschedule their day and be required to personally appear and the citing officer who carries the burden of proof can merely submit a written statement for consideration would not be perceived by the public as fair. The potential that a defendant could be held responsible without the opportunity for the court or the defendant to question the citing officer would not be perceived as fair. Determining the credibility of the officer would be next to impossible. Simply concluded, the process proposed would erode public confidence and respect for our court system. We thank you for your consideration. We appreciate the hard work you do. We ask that you reject proposed Rule 4.101. Thank you.

JUSTICE TAYLOR: Thank you ma'am. Kristin Vanden Berg.

ITEM 11: 2001-10 MCR 8.123 APPOINTMENT OF COUNSEL

MS. VANDEN BERG: Good morning, Mr. Chief Justice and Justices. My name is Kristin Vanden Berg and I'd like to thank you for the opportunity to comment on proposed amendments to Michigan court rule 8.123. This is actually the second time I've had the pleasure of addressing the Court on that particular court rule. The first time was in September of 2002 when I appeared on behalf of the Michigan Public Defense Task Force. At this point I am representing the Michigan Council on Crime and Delinquency. I am secretary of that organization. I also have continued to work with the Michigan Public Defense Task Force which was convened by MCCD in 1991 and has continued to be facilitated by MCCD. When I appeared the last time, the Court was deeply concerned

that the public perception of judicial independence and fairness were being eroded by certain well-publicized instances of abuse of the judicial appointment process and the proposed rule, which was substantially adopted was designed to protect the integrity of the court by introducing a measure of accountability for local appointment systems. And now, less than 2 years after that rule became effective, the Court is considering eliminating most of the reporting requirements which were established by the rule. On behalf of MCCD I strenuously urge you not to abandon but instead to consider expanding the limited reported requirements you so recently adopted. While I recognize that all reporting requirements impose burdens on local governmental units, it is essential that the public and its representatives have access to accurate data about the current delivery system in order to assess that system's performance, to insure accountability in the use of public funds and to address the existing inequities in the delivery of public defense services across the state. The mission of MCCD is to improve the effectiveness of policies and systems that address the prevention and control of crime and delinquency and as a citizen-based group, MCCD is deeply concerned with the present inequalities in the delivery of public defense services in Michigan and with the need for all aspects of the justice system to deliver services in an efficient, holistic and restorative way. The work of the public defense task force has repeatedly revealed the existence of substantial inequities across the state, but the lack of consistency in reporting and accounting has impaired every attempt to obtain accurate data about total costs, numbers and types of cases, dispositions, individual attorney reimbursement, attorney qualifications and attorney case loads for all appointed counsel in every county of the state. Substantial long-term economic challenges face our governments at the local, state and national levels, and we recognize this. And in addition, Michigan is facing additional and retroactive burdens following the Supreme Court's decision in Halbert. At this juncture, it is essential that every publicly funded program, including public defense, be systematically evaluated.

JUSTICE TAYLOR: Ms. Vanden Berg, your time is expired. William Long.

MR. LONG: Chief Justice Taylor, Justices. My comments are made on behalf of the Michigan Public Defense Task Force that Kristin Vanden Berg just referred to. The task force has drafted a proposed bill to improve trial level public defense services. Among the provisions in the draft bill is the establishment of a public defense commission whose responsibilities would include development of standards and administrative oversight of a state-wide plan of delivering public defense services. The task force proposes to call that bill The Michigan Public Defense Act and that draft legislation can be obtained at www.mipublicdefense.org. I have copies of that draft legislation if it is appropriate or permissive to provide with the Court. Under the draft bill each county or a group of counties joining together to establish a public defense system would be required to report specific information annually to the state office of public defense. The task force believes accountability is absolutely essential to insure Michigan

citizens fairness, equity and integrity within Michigan's public criminal defense system. The required information to be provided in the proposed public defense act would enhance that accountability. As Kristin had indicated, we have an indigent defense system starved for resources at a time when there is severe, we recognize, competition for additional resources at all levels of government. For obvious reasons, funding that government obligation has not been and will not be popular, but it is critical that we have accountability and integrity in our criminal defense system. Planning to use resources wisely for monitoring abuse in the system requires effective data. To date, Michigan is one of only a few states that cannot supply that information on a routine basis. The proposed amendment to Rule 8.123 would weaken the uniform base of information essential to not only approve the system but hold those accountable who are receiving and spending public monies on behalf of the defendants, the courts and the larger citizenry. We propose that instead of deleting information required annually in subsection (d) of the current rule, if modified at all the rule should require annual reporting of the information specified in the draft public defense act. The proposed amendment to Rule 8.123 we believe would weaken the Court's ability to carry out its constitutional responsibility of superintending control over all courts. We urge the Court to not adopt the proposed amendment to Rule 8.123.

JUSTICE TAYLOR: Thank you sir. Frank Eaman.

MR. EAMAN: Mr. Chief Justice, other members of the Court, pleased to be here this morning to address 8.123. Now that I'm 60 I can provide historical perspective on this issue and in fact I have been historically involved in the role of assigned counsel throughout the state beginning in the 1970s as a board member of what was then called the Legal Aid and Defender Association of the Detroit Bar, continuing in the 1980s as the chairperson of the State Bar's task force on assigned counsel standards. And we found out when we began that task force work on behalf of the state bar that no one knew how much money was being spent statewide on assigned counsel. And I will tell you today, as I stand here, no on knows how much money is being spent statewide on assigned counsel. We did a survey of each court, every district and circuit court with the assistance of Justice Levin who signed a letter on our behalf, asking them to supply data. I can tell you in 1986 what was spent on assigned counsel in criminal cases in the state of Michigan but I cannot tell you after that what was spent because Michigan is one of the few remaining states that has a county by county system that provides this important constitutional function of government, mandated by the 6th Amendment, and yet we leave it to the counties. And we do that because Michigan historically had assigned counsel before *Gideon* and it had it on a county by county basis, but since *Gideon* almost all the states in the country have changed over to a state defender system. What we lack are the following data: the gross sums paid to assigned counsel broken down by type of case: juvenile, misdemeanor, felony; the total amounts paid to individual attorneys or defender offices; the number of cases for which counsel is assigned; the method of assignment; the pay schedule for assigned cases. None of that is known on a statewide

basis. Very hard to find even on a county basis. As some of you may know, I've represented bar associations who tried to raise assigned counsel fees, particularly in Wayne County. I can tell you if you look at the budget summary of Wayne County you will not see a line item for what is spent on assigned counsel. That is not reported. This is a state funded taxpayer service, a governmental service and what we need is more data, not less. So we would urge you rather than adopting the amendments to the rules, to strengthen the rule. Thank you.

JUSTICE TAYLOR: Thank you. Michael Steinberg.

MR. STEINBERG: Good morning, Your Honors, my name is Michael J. Steinberg and I'm the legal director for the American Civil Liberties Union of Michigan. As you know, the ACLU has long been devoted to insuring that poor people in this country receive effective assistance of counsel, both at the trial level and on appeal. The Michigan ACLU, the national ACLU, the Brennan Center for Justice and several volunteer attorneys from Dykema Gossett and Krebak Swain (sp) are currently studying the manner in which indigent defense is provided in the state of Michigan. I am here on behalf of this coalition to urge this Court to continue to require counties to compile information about their respective systems of indigent defense systems that will enable the State Court Administrator's Office and other organizations to evaluate the adequacy of these systems throughout the state. Under Gideon it is the state of Michigan that is ultimately responsible for insuring that indigent defense in this state is adequate. There are counties where indigent defense is inadequate. It is not just the problem of the counties--it's the state's legal responsibility to fix the problem. From our investigation so far we believe that there are structural and systemic problems with the provision of trial defense to indigents in this state. MCR 8.123 has helped to shine light on the problems that exist in the state and 8.123 reports of greatly assisted us in our investigations. For example, there appears to be a tremendous problem with the number of criminal cases that appointed attorneys handle in this state. It is common for appointed attorneys to handle far more cases than those permitted under the maximum caseload standards developed by the ABA. By eliminating subsection (D)(1) it would be extremely difficult for the state or for other organizations to track this problem. Not only are there built in financial pressures on appointed attorneys to plead out as many cases as possible without doing adequate investigations, but there are also pressures in the state placed by some judges, either intentionally or unintentionally, on attorneys in order to keep the docket moving. When the judges determine who is the appointed attorney, these attorneys are often afraid that they will lose appointments if they zealously represent their case and bring the case to trial or do a preliminary examination or a motion to suppress evidence. The information obtained as a result of subsections (D)(2) and (D)(4) is critical to track this problem. We ask that these provisions not be eliminated as well. In closing I just want to say that the coalition which I am representing here strongly supports the written statements submitted by the public defense task force and by Michigan Council on Crime and Delinquency. Thank you.

JUSTICE TAYLOR: Thank you. Judge Borchard.

ITEM 12: 2004-42 MCR 8.103, 8.107, 8.110 SPEEDY TRIAL

JUDGE BORCHARD: Good morning. May it please this Honorable Court, I am here today to speak in regards to File No. 2004-42. I believe it's rare that the Michigan Judges Association has representation to speak on proposed rule changes but I've been asked by the MJA Board of Directors, as well as, as an elected officer to that organization and as a member of the rules committee to speak in opposition on behalf of the membership to those proposed changes. I cannot attempt and would not attempt to go through the reasons, as I believe a number of those concerns have already been expressed eloquently by my colleagues in written comment. I, along with my colleagues, have the utmost respect for this Court and for the efforts that this Court is making to improve and promote the prompt administration of justice. However, I believe that the organization along with many of us feels in order to be successful at this we would like to seek the organization and formulation of a committee to work at improving time management in review of these guidelines that are covered in these proposed changes. We look at this as similar to the Court of Appeals and Judge Whitbeck's efforts as being an ongoing process to improve court management. We're asking that the Court give consideration to formulation of representatives from the trial judges, the Supreme Court, the Court Administrator's office, rules committee, the bar and citizens, in the hopes that they'll come up with a workable product that meets the concerns of all stakeholders. Long ago, Edmund Burke reminded us all to be sensitive as judges to the destructive effects of delay. Everyone wants prompt justice at the least possible expense. However I think it's important that as members of the judicial system we keep in mind that doing more quicker has the potential of ignoring the quality of work and this isn't the answer. It reminds me of working in the shop during the summer when I was told to have so many cars out the door at the end of the day and people were left with the impression that they didn't care whether the fender was screwed on right or the door shut appropriately. Just get the car out the door. I do take pride in my work and trying to do it right, as I like to think that all of my colleagues do. And we believe that the proposed rule changes and timeline suggestions don't really take into consideration the entire problem that we have with our docket. When I was admitted or sworn in as a judge I was provided with a copy of the Judges' Handbook. And there is a chapter in there on time management that made just such suggestions as I am proposing and that the association is proposing. My colleagues and I have a concern that the way the guidelines are now set up and proposed, they may be used against our membership. And in concluding--

JUSTICE YOUNG: If MCR 8.103, which is the proposal of the JTC to be allowed to have the SCAO prosecute for consistent failure, and if only 8.107 and 8.110 were retained as a reporting mechanism, your concerns abate?

JUDGE BORCHARD: Some of them are abated. The 35 days, judge, I just don't believe is realistic and I say this in all politeness. It would be like me giving a rule to this Court saying we want your opinions out in 30 days or 60 days. We all know that is just ridiculous and I don't know of anyone that would expect that.

JUSTICE YOUNG: Yet you're under that now under the guidelines now, right?

JUDGE BORCHARD: Well the guidelines now, the reporting one is that we have 4 months, and I have not yet had to report one that is late, and I do try to get all of them out. But I've had a case this week where I have a lawyer with cancer. I could come up with any number of examples that are of concern to our membership. And the concern that we have is also expressed in this judges book and it noted in there and the concern is that these standards and guidelines are going to be used as a basis for discipline and that's just what the book cautioned against. They should not be used as a basis of discipline but rather should be goals that are sought.

JUSTICE TAYLOR: Excuse me. Your time is up. If you want to send us some more written information, I think we have your views however.

JUDGE BORCHARD: I appreciate it and I plead that you give consideration to our request. Thank you very kindly.

JUSTICE TAYLOR: Donald McGinnis.

MR. MCGINNIS: Good morning Mr. Chief Justice, fellow Justices. I too speak in opposition of the proposed amendment to the court rule 8.123 and, to be very concise because there are time limitations, the portion of 8.123 that really concerns the Oakland County Bar Association for which I am present is the automatic referral to the JTC. We believe that under the present set of circumstances, the amendment to that rule is unnecessary and it's ill-defined and it unfairly subjects all judges to request for investigation. And most important to the practitioners, it's incompatible with the various other court rules. As this Court well knows, Judicial Canon 3.85 does provide that each of the Justices of the courts of the state of Michigan shall take business of the courts in a timely manner. Therefore, any violation of the timely manner could be referred to the JTC based on that rule alone. The other problem is that as it relates to the control of the local courts concerning those chief judges of those courts, it takes away the power. Under MCR 8.110(C)(3)(a), the chief judge of the court that is involved in this proposed amendment are already empowered to control their own docket, to deal with those judges that are not providing services or taking care of the business of the court. The proposed automatic referral provision takes that away from the chief judges of the court of which each court shall be divined as defined by statute. Additionally, Your Honor, it is ill-defined and overbroad. What the amendment says is consistently. What is consistently? I

mean there could be a multitude of interpretations that could be derided under the term "consistently". It doesn't take into consideration caseload management standards; it doesn't take into consideration the actual amount of the caseload. Therefore the term "consistently" would subject judges to a vague guideline or a vague standard. But particularly as a practitioner and as the Bar Association president, we're concerned that this will create a situation where caseload management will come ahead of justice as it relates to cases.

JUSTICE CORRIGAN: Mr. McGinnis, a quick question for you, sir. You are familiar with these matters on decided reports that have to be submitted.

MR. MCGINNIS: Yes, ma'am.

JUSTICE CORRIGAN: Does the chief judge have to countersign those reports?

MR. MCGINNIS: It is my understanding that the chief judge has to countersign those reports, Your Honor. Number 4 is really the concern. Let's say that we're before the court on a delicate child custody matter involving psychological reports. A delicate family matter concerning a business evaluation. Those types of matters will exceed your guidelines, not by the intent of the trial judge but by the nature and the complexity of the case. And to have a trial judge come to me and say Mr. McGinnis you must conclude your case because I'm going to be reported to the JTC robs my client of the opportunity of a fair and complete trial.

JUSTICE TAYLOR: Mr. McGinnis, thank you. Scott Strattard.

MR. STRATTARD: Chief Justice Taylor, ladies and gentlemen of the Court, good morning. I appreciate the opportunity to briefly raise some concerns I have regarding the proposed amendments in Item 12 of today's docket. One thing a good lawyer should always keep in mind is that in any particular case on which he or she is working at any given time, it is most often that client's only case. It is, however, fortunately or unfortunately, depending on your point of view, certainly not the practitioner's only case. So what every good lawyer strives to do is devote 110% to the case that is before him in an effort to obtain a correct legal result of maximum benefit to the client. A trial judge's situation is similar with the differing goal of achieving the correct legal result that is of greatest benefit not necessarily to my client, but to Michigan jurisprudence. That takes time. As you know, I'm an appellate attorney as I must say I was very surprised to learn of some of the timeframes contained in the guidelines of 2003-7. And I stress the word guidelines. What concerns me most about the proposed amendments is the transformation of these guidelines into standards with a reporting requirement to the JTC when the state court administrator, apparently in his or her own judgment only, determines there has been a consistent failure to comply with the

standards. My concern becomes exacerbated based upon granting my own ignorance. I do not have any idea what statistics have been compiled in order to ascertain whether the guidelines in 2003-7 are realistic guidelines. Trial practitioners, however, uniformly tell me that they are not. If that is so, incumbent judges throughout the state who do make every effort to enhance caseload management will be unjustifiably subjected to a record of formal reports to the JTC that surely will serve as campaign fodder during the judicial election. I'm also concerned about the reduction from 4 months to 35 days. In all my years of practice I have had very few complaints about the timeliness of the juxtiposition of cases but as an appellate attorney I hear plenty about the dissatisfaction with the analysis and the results obtained. It takes more time to get it right than to get it wrong, and I am concerned that a shortened time requirement of this proportion increases the chance for error. It is ironic that I stand before you opposing these amendments, as for me, of course, legal error is appellate job security. I would urge you not to adopt these amendments at this time and instead I agree with Judge Borchard, I think an ad hoc committee should be appointed and careful study should be given as to whether 2003-7 are realistic goals. I thank you very much for your time.

JUSTICE TAYLOR: Thank you sir. Judge Benson.

JUDGE BENSON: Chief Justice Taylor, other Justices of the Court, good morning. Thank you for giving me this opportunity to speak with you. I'm president of the Michigan District Judges Association and have filed a written response that has already been filed with the Court and I will not go over that with you. In reviewing all of the comments that have been made and posted on the website, I was struck that nobody spoke in favor of these rule changes. I agree with the comments that have been filed with you and have been made here today. I would add one more argument in opposition to these changes. Historically the trial courts have had a good working relationship with the State Court Administrator's Office. It has provided support and guidance to the trial courts. The existence of a good working and trusting relationship has encouraged the courts to feel free to enlist the aid of the State Court Administrator's Office in dealing with challenges and problems encountered by the individual courts. The trial courts believe that the State Court Administrator's Office was there to assist them in improving the delivery of justice in the various courts. Any problems could be discussed frankly. We enjoyed a sense of working together to solve problems in the trial courts. That good working relationship is greatly threatened by these proposed rule changes. The existing rules provide ample authority for the State Court Administrator's Office to deal with the problems, and those have been referenced here by the speakers before me. This would include referring a judge to the Judicial Tenure Commission for investigation. These proposed changes cast the State Court Administrator's Office in the role of enforcing unrealistic standards with the requirement under certain circumstances that the problem shall be referred to the Judicial Tenure Commission for investigation, rather than helping the court to solve its problems. This will create an antagonistic relationship between the

trial courts and the State Court Administrator's Office to the detriment of the judicial system. Thank you very much for listening.

JUSTICE TAYLOR: Thank you. Terrance Bacon.

ITEM 13: 2003-19 MRPC 1.15 IOLTA

MR. BACON: Good morning again. I requested the opportunity to comment here solely on this proposed Rule 1.15. Principally the request for comment was to emphasize the necessity that you look at this in light of the comments that were submitted by numerous groups with respect to the overall change in the proposed rules, which also included 1.15 and some of those proposed changes have been put into this separate 1.15 and that it should be recognized that there were numerous comments on those. For example, the addition to the trust account requirements that advance payment of expenses, which is not in the current rule, is in this rule. There is a practical issue in that regard that many of you may think about, if you will, and that is that while lawyers when they're appointed may very well have an obligation to perform legal services in advance of payment, there is nothing that exists that I'm aware of in any rule or common law requiring lawyers to advance costs to a client. The practicality of that is when money is put into a trust account there is a delay. There is a delay for money, checks to clear, before you can pay things out of a trust account for purposes of expenses. I don't know what the reason was that when Michigan adopted its rules back in the 1980s, that they made the distinction between expenses and fees. That may be one of them, and these rules don't seem to take that into account. Second, because of that change and because of the practice, this is another rule that would be important to have a transition time put into it so that if people are holding money, expenses, not separately in trust accounts, that there be time and alerted to that implementation. Third, a different issue that comes up under this rule and even the current rules, is for you to focus on how does this rule apply to lawyers or law firms with multi-jurisdictional practices. The rule is written in terms of payments into the Michigan IOLTA funds. What happens for the lawyer that has an office in Ohio admitted to practice in Michigan or has an office in both. I would suggest that the rule ought to be rewritten in terms of recognizing that the funds from the IOLTA if they meet any state in which that lawyer has an office. Last, with respect to the actual alternatives, they are there, I would suggest that Alternative A is the appropriate alternative, frankly if nothing more than the inconsistency in some of the language for Alternatives B and C, both of which say that the lawyer shall base his decision solely on whether the funds could be invested to provide a positive net return for the client. That is the language of both B and C, not in A, and yet all three purport to address situations where you're holding money for the client or a third person. Thank you.

JUSTICE TAYLOR: Thank you. Jon Muth.

MR. MUTH: Mr. Chief Justice, Justices of the Court, my name is John Muth. I'm a trustee of the Michigan State Bar Foundation and I appear here on its behalf in support of the proposed changes to the Michigan Rule of Professional Conduct 1.15 better known as the IOLTA Rule. The Michigan State Bar Foundation which has been charged since 1990 with the administration of the IOLTA program in the state of Michigan has proposed six changes. I will address here today the two most substantive, the first being what I will term the $50 threshold, and the second being the interest rate parody portion of the rule. These changes are triggered by two external events, the first being the 2003 decision, United States Supreme Court, in Brown v Legal Foundation of Washington, and the second being changes in the way the banking industry has offered accounts of an interest-bearing nature to its customer base since the rule was initiated in 1990. First, with respect to the $50 threshold, Brown dictates a change. The linchpin of the majority's takings analysis in Brown was that the Washington rule actually assured every client that there would be no loss of net income to the owner, and therefore no compensation due for any taking. A $50 threshold, indeed perhaps no reasonable threshold can guarantee that. Therefore, the only real change proposed in the rule is that the lawyer must determine whether the actual cost in his operation or her operation of opening and maintaining the account of an interest-bearing nature, and to apply that standard to the question of whether net interest could be earned by the client. The rule does this fairly simply and straightforwardly. The rule explains the process. The court approved guidance brochure leads the lawyer through it, and the Foundation intends to create on its website a template that will allow lawyers to do the calculation. I know there was some concern expressed as to whether this was understandable to the practitioner. Frankly, in my firm the real question is whether Diane in Bookkeeping understands it, and she does. She has been doing this and segregating accounts from IOLTA to non-IOLTA accounts for 15 years. Even when lawyers have to take the task under their own control, we believe that this is something that is easily accomplished. And we note that there is a failsafe. For years Michigan State Bar Foundation has provided refunds in the event of mistakes. There are three alternatives. We prefer (B) because it both incorporates the general principle and the basic guidance. With respect to the second issue--interest rate parody--this Court on June 15 adopted the interest rate parody rule. We support its retention. In 1990 at the dawn of IOLTA, the NOW account, or an interest bearing checking account was about the only option available. The banking industry has now made a number of other options available--

JUSTICE TAYLOR: Mr. Muth, your time is completed. Thank you. Linda Rexer.

MS. REXER: Chief Justice Taylor and Justices, good morning. I'm really just here to answer questions since Jon covered the key points and we've submitted written comments.

JUSTICE TAYLOR: Thank you. Any questions?

JUSTICE KELLY: You support Amendment A, is it?

MS. REXER: We proposed Amendment A. We prefer B because it strengthens it further.

JUSTICE MARKMAN: Do you have any quick thoughts in response to Mr. Bacon's concerns about multi-jurisdictional practitioners?

MS. REXER: To my recollection, there is a state bar ethics opinion that holds that complying with IOLTA in another state is adequate for complying with IOLTA here. Other than that, practically speaking over the last 15 years we have had very little of this issue come up.

JUSTICE TAYLOR: Thank you. Other questions? Thank you. Karen Stephens.

ITEM 15: 2004-33 MCR 9.221 JTC CONFIDENTIALITY

MS. STEPHENS: Good morning. I'm Karen Stephens and I'm currently a middle school librarian, formerly a high school economics and social studies teacher and previously for about 10 years, in the auto industry doing industrial intelligence. I am addressing confidentiality and privilege of the Judicial Tenure Commission, in other words creating a more secret closed system. We have an open democratic society and government which have been affirmed by the Freedom of Information and Open Meetings Acts. The Citizens for Legal Responsibility have already reviewed your amendment and have an opinion regarding this amendment for my exhibit 3. My concerns rest with closed, secret information which is adverse to our American core democratic values and the spirit of our great democracy. This conflict has actually played out in recent days. For instance, any information deemed secret would violate the democratic values of justice. Then there would be no knowledge or benchmark for all the people to know if they are treated impartially. Popular sovereignty--then the power of the people would be usurped by the courts protecting their own. Truth--then the people would not know if falsehoods were present in their courts. Common good--then the people would not know if the judiciary is supporting the common good or protecting the incestuous nature of the judicial system. Equality and diversity--then the people would not know if all the people were treated equally. Liberty--then the people would not know if all the people had their freedoms and rights protected by the courts. Life--that all people would not know if the judicial system had an impartial effect on their lives and the lives of fellow Americans. Pursuant of happiness--then all the people would not know if all citizens' rights are intact to pursue happiness. Patriotism--secret information is unpatriotic as it undermines the core democratic values upon which our great American documents rest. A perfect example of the contraindication of secret information regarding

judges is in regards to the removal of Oakland County Chief Judge Barry Howard which was announced only as a retirement. Chief Judge Howard per the Kathy Bullard affidavit violated civil rights while on the bench and was ultimately removed. This secrecy has kept other Howard cases off the public radar screen. With a conflict of interest Barry Howard then became employed by the law firm Honigman Miller Schwartz and Cohn where attorney Schwartz is on Pulte's board of directors and actually represents Pulte, the builder who benefited from the inconsistent Howard mega-million dollar Samsone decision. There is an appearance of a cabala. As for all intents and purposes, Samsone is Pulte. Rhetorically, how could a park be developed if not for a spurious lawsuit where an intentional theory of liability could have been created to transfer property rights as eminent domain could not apply to a city park. It has been established that Judge Howard did not follow the law in the Miller case and contemporaneously there were at least three builder cases in the Howard court which were ruled inconsistently to benefit builders. In Samsone the City of Novi was held liable for mega millions. In King in the City of Rochester Hills was dismissed based on government immunity, and in Shepard Judge Howard remanded the case deliberately to Judge Towen Kaiak (sp?) based on an expired order which itself states judges are to be assigned by random draw. The Samsone/McKennon cases then reappeared together in the McDonald court where property rights were transferred to builders and the judge and the attorney paid off mortgages and purchased real estate on the same day. The secrecy regarding Judge Howard's removal from the bench caused the public to view the other Howard decisions with a blind eye.

JUSTICE TAYLOR: Ms. Stephens, your time is completed. Thank you. Frank Lawrence. Marie Dreilich.

MS. DREILICH: Good morning Justices and Chief Justice. I'm Marie Dreilich and I'm speaking in regards to the JTC's request for confidentiality and privilege. I'm not here to argue my lower court cases, but it is necessary to relay what I went to the JTC with. There was a formal complaint against a judge who severely violated almost every single judicial code of conduct with over 100 exhibits. But instead, I received a letter from the JTC and Mr. Fischer claiming that judicial misconduct is a form of art. They did nothing, nor did they initiate an investigation. I'm under the impression that Mr. Fischer and the JTC just pick and choose what judges they want to go after, no matter how viable these complaints are. Secrecy and privilege allow this practice to occur without the public's knowledge and could be politically motivated. As Mr. Fischer is aware, a judge allowed an attorney to obtain a PPO against me without ever having been harassed, molested, stalked or threatened. The language in the PPO dictates that I am not to have contact with any of his ex-clients or victims. This includes Karen Stephens who just spoke, so technically I'm in violation of the PPO as I speak. Karen and I attended church and court together, and without the attorney's presence, the judge ordered me to be arrested twice for being in court with Karen Stephens. I served 9 days in jail. The sole intent was to keep us from testifying for each other in our respective legal malpractice

suits against this attorney who used to work at the same court. The JTC was sent the transcript where this judge banned me from church and court and I received yet another form letter. The JTC repeatedly ignores the huge violations of the Constitution, the judicial codes of conduct. There should actually be an internal investigation and not allow them further secrecy and privilege. In conclusion, the JTC needs to have the Freedom of Information Act in place and allow public access to these complaints against judges. Otherwise the judges that violate the codes of conduct and commit treason are repeatedly held unaccountable. They will simply continue their abuse of power. The public needs to be informed and confidentiality of these matters will only continue to destroy the public's trust. Thank you.

JUSTICE TAYLOR: Thank you.

JUSTICE CORRIGAN: Mr. Chief Justice, could we make a statement with regard to Judge Howard since all of us on this Court are well aware that Judge Barry Howard was not removed by the Judicial Tenure Commission but instead resigned his office. I served as Chief Justice and received his letter of resignation and we are all well-aware there were no such removal proceedings.

JUSTICE TAYLOR: Thank you.

JUSTICE MARKMAN: Chief, may I ask Mr. Fischer one question?

JUSTICE TAYLOR: Yes.

MR. FISCHER: Good morning.

JUSTICE MARKMAN: I thank Justice Corrigan for her comments which I believe are quite accurate. I'd like to ask you one question, Mr. Fischer. When we circulated the proposed amendments to MCR 9.221 we published a proposed subrule (I) at the same time. And in your response I didn't see any comments upon that proposed subrule. Was that because you have no comments or was there some other explanation for that?

MR. FISCHER: The Commission took no position on that provision.

JUSTICE MARKMAN: Okay, thank you.

JUSTICE TAYLOR: Other questions for Mr. Fischer? Thank you, sir. Joan Von Handorf.

ITEM 16: 2004-54 MCR 5.144 ETC CONSERVATORSHIP RULES

MS. VON HANDORF: Good morning Chief Justice and Justices. My name is Joan Von Handorf. I'm a sole practitioner and I'm also co-chair of the Probate and Estate Planning Section's Uniformity of Practice Committee. We have submitted some court rules with regard to administrative 2004-54 and I want to respond to some of those comments here today, but first of all I would like to tell you how I began this quest for uniformity of practice, which is very important to us practitioners. A few years ago I filed a petition to remove a guardian and I used the SCAO form, same form I had used six months earlier in the same court for the same thing, but the clerk told me I had the wrong form, I had to use the court's form. And so I took that form back to my office, retyped it, and sent it back to my client with apologies, and she sent it back to me signed and then I was able to file it. But I looked inefficient and incompetent and that got to me. This has happened to me many times before, it happened to many other attorneys, but I decided I was going to do something about it this time. And with the help of the Probate and Estate Planning Council, we were able to submit questionnaires to the court and determine what some of the court's practices and procedures were and based on those practices and procedures we proposed some court rules, which hopefully will obtain and achieve uniformity of practice. I'd like to respond to the comments on two of those court rules which we have submitted. The first one is MCR 5.302(A) which deals with whether a death certificate needs to be filed when an estate is opened. Due to the fact that both the application and the petition require the same information that the court needs which is on the death certificate, we contend that filing a death certificate is not required. The information is on the petition and on the application and these documents are signed under penalties of perjury, so based on that we believe a death certificate is not required when an estate is opened. I would also like to respond to the comments on 5.409(B) which deals with an inventory which needs to be filed with regard to a guardianship or conservatorship. Right now most of the courts do not require that the percentage that the ward owns be shown as the value on the inventory. Some of the courts do not, and the purpose of this rule is to come up with a general rule which clearly states what's to be shown on the inventory. And there is an Attorney General opinion which says that the percentage owned by the ward be shown on the inventory and we're asking for a clear rule as to how this should be done. In general, we're asking for clear rules so that the courts to not differ from court to court and we as practitioners know what to do. I want to thank you for the opportunity to talk to you about uniformity of practice today.

JUSTICE TAYLOR: Thank you. That completes the public hearing. We stand in recess.